No. 11,906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LeRoy Cowan,
Appellant,

vs.

Young Iron Works (a corporation),
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION OF DISTRICT COURT AND OF THIS COURT TO REVIEW THE ORDER APPEALED FROM.

In the above action, which was commenced by the filing of a complaint on May 29, 1947, in the Superior Court of the State of California in and for the County of Sacramento, plaintiff seeks damages in the sum of $54,832.22 from defendant by reason of certain personal injuries sustained by plaintiff on August 12, 1946. The action is based on the alleged negligence of defendant which is a corporation engaged in the business of manufacturing logging equipment and appliances, in manufacturing and placing on the market for sale a certain device used in lumbering

operations and known as a swivel bolt, and in consequence of which, while being used by plaintiff's employer, near Georgetown, County of El Dorado, State of California, for the purpose for which it was intended in conducting logging operations, said swivel, because of certain defects therein, burst asunder and caused the load being carried thereby to be precipitated downward and fall upon the head of plaintiff with the result that plaintiff was caused to receive severe injuries to his skull and brain. In plaintiff's complaint, which is set forth commencing on page 2 of the printed record, it is also alleged, in addition to the foregoing facts, that at all times therein referred to the defendant, Young Iron Works, was and still is a corporation, organized and existing under and by virtue of the laws of the State of Washington, and that at all of said times, said defendant was and still is doing business in the State of California.

On June 2, 1947, process in the action was served on said defendant by delivery thereof to the Secretary of State of California in the manner prescribed by Section 406(a) of the California Civil Code. Thereafter, on July 1, 1947, defendant filed a petition in said Superior Court for the removal of the action to the United States District Court for the Northern District of California, Northern Division, on the ground of diversity of citizenship in that plaintiff was a resident of said district and that defendant was a citizen of the State of Washington. The petition for such removal is set forth on page 22 of the printed record. In accordance with this petition an order for

removal was made by the state court on July 1, 1947 (Rec., p. 26), and the record in the cause was thereupon filed in said United States District Court on July 28, 1947. (Rec., p. 38.) Thereafter, on July 29, 1947, defendant filed in said District Court a motion to quash service of summons on the ground defendant was a foreign corporation and was not transacting or carrying on business in the State of California and was consequently not subject to the jurisdiction of any Court, either state or federal, within the State of California. (Rec., p. 27.) After hearing on this motion, an order was made by the District Court on January 29, 1948, ordering that service of summons on said defendant be quashed. (Rec., p. 31.) It is from this order quashing service of summons that the present appeal is taken. (Rec., p. 39.)

The District Court has jurisdiction to entertain the above action on the ground that the matter in controversy exceeded $3,000.00 and was between citizens of different states (28 U.S.C.A. Sec. 41(1); 28 U.S.C.A. Sec. 71); and this Court has jurisdiction to review the order of the District Court quashing service of summons, such order being a final decision and appealable to this Court within the purview of subdivisions (a) and (d) of Section 225, Title 28 U.S.C.A. (*Rosenberg Bros. v. Curtis Brown Company,* 260 U. S. 516, 67 L. ed. 372; *E. I. Du Pont De Nemours & Co. v. Byrnes,* 101 Fed. (2d) 14.)

STATEMENT OF THE CASE.

Defendant, which is a corporation organized under the laws of Washington, is engaged in the business of manufacturing and selling to the general public various mechanical devices such as blocks, tongs, hooks, swivels, sockets, shackles, and clevises. Its plant is located at Seattle, Washington from where orders are filled from stock or there manufactured. Sales are made in California to dealers who handle mining, quarrying, logging and marine equipment.

The device manufactured by defendant known as a swivel is used for the purpose of supporting cables utilized in lifting or pulling heavy loads by means of a derrick, and among other purposes is used in connection with logging operations. On August 12, 1946, plaintiff, while working for the Eldo Lumber Company in connection with logging operations conducted near Georgetown, El Dorado County, California, was severely injured as a result of the bursting asunder of a swivel manufactured by defendant, and which only a short while before had been obtained by plaintiff's employer from defendant by means of an order placed with defendant's dealer located at Sacramento, California, and to whom defendant had given the exclusive privilege of selling defendant's products in the Sacramento area, including the County of El Dorado. In plaintiff's complaint, it is alleged that the breaking of the swivel which caused plaintiff's injury was due to defects existing in the metal thereof which resulted from the carelessness and negligence of defendant in manufacturing said swivel and in failing

to use flawless material therein or to properly forge or weld the same and in failing to properly inspect or test the swivel for defects and tensile strength. It is also alleged that at the time said swivel was manufactured by defendant and delivered by it to its dealer at Sacramento, defendant knew the swivel would be apt to be used by the purchaser thereof from said dealer to support cables utilized in lifting or pulling heavy loads by a derrick in connection with logging operations.

Upon the service of process on defendant through the medium of the Secretary of State of California, in the manner prescribed by Section 406(a) of the California Civil Code, defendant moved to quash service of summons on the ground it was not doing business in California. The motion was supported by an affidavit of defendant's president, Paul J. Isaacson (Rec., p. 18). the substance of which is set forth in the opinion of the District Court (Rec., p. 31), as follows:

> "The supporting affidavit states that the defendant corporation is organized under the laws of the State of Washington and that it is engaged in a manufacturing business in that state. It has no stock of goods and maintains no office or place of business in California. The customers of the manufactured products are dealers who handle mining, quarrying, logging and marine equipment, or other users, all of whom place their orders and buy direct for their own accounts. Shipments are made from Washington to California to fill these orders. The corporation has

> one salesman who resides in Washington and who visits prospective customers in various western states once or twice a year. No installation, engineering or maintenance service is performed by defendant in California. No sales or transactions are made in this state for the account of the corporation."

In opposition to the motion to quash, plaintiff, pursuant to leave granted by order of court, took the depositions of Albert S. Weaver, Jr. and Thomas H. Lynn, who were officials of Weaver Tractor Company, a California corporation, and which has been the exclusive dealer of defendant's products in the Sacramento Valley area since 1945. These depositions (commencing at p. 51 of the record) show the following uncontradicted facts, which, along with the other circumstances involved, plaintiff contends are amply sufficient to impel the holding that defendant is doing business in California within the purview and intent of the process statute.

The deposition of Albert S. Weaver, Jr., who was president of Weaver Tractor Company, shows his firm handles the products of defendant pertinent to logging such as swivels, and that such products have been thus handled "in a fairly large way since 1945" prior to which time defendant's products were handled by another Sacramento firm known as "Capital Tractor". (Rec., p. 54.) The deposition also shows the products of defendant are handled under an arrangement whereby Weaver Tractor Company was accorded the privilege of purchasing such products from defendant

under a rather complicated discount procedure for the purpose of resale (Rec., p. 55), and that this is done by Weaver Tractor Company issuing purchase orders on defendant for merchandise which is shipped and billed monthly on open account on the basis of a billing less the discount. (Rec., pp. 77, 93.) It also appears that under its arrangement with Weaver Tractor Company, defendant agreed that the latter should have the exclusive right to handle defendant's products in the Sacramento Valley trade area, embracing the counties of Sacramento, Nevada, Yolo, El Dorado, Yuba and Amador; that defendant agreed it would not market its products through any other concern in that area; and that if a user of defendant's products in such area sent an order to defendant direct, it would be referred to Weaver Tractor Company to be filled, the latter being the only concern in such area from which defendant's products could be purchased. (Rec., pp. 55, 56, 57.)

In this latter regard, the deposition of Thomas H. Lynn shows:

> "Q. Do you happen to know, Mr. Lynn, whether Young Iron Works ever ships any of their products to the ultimate consumer direct in the area covered by Weaver Tractor Company?
>
> Mr. Davies. If you know they do.
>
> The Witness. I know they don't.
>
> Q. (by Mr. McDougall). How do you know that?
>
> A. Perhaps I should amend that. To my knowledge, they don't.

Q. Now, will you amplify that? You were going to.

A. Well, we are the distributor or retail outlet for their products here, and to the best of my knowledge whenever an order or an inquiry is sent to the Young Iron Works in Seattle from the area which we serve, it is referred to us. There is a letter written to the ultimate consumer stating that we are the retail *distributor** of their products for that area, and that they should contact us regarding purchase of that item, and a carbon copy of the letter is then mailed to us for a follow-up so that we can call on the party.

Q. And as far as you know the ultimate distributor—or the ultimate consumer will then call on Weaver Tractor Company——

A. To the best of my knowledge, yes.

Q. (continuing). ——to make a purchase of whatever he wants?

A. That is correct."

(Rec., pp. 89, 90.)

Under the arrangement, it also appears merchandise returned by customers was handled as follows:

"Q. Now, with reference to this arrangement under which you handle those products, will you state what routine is followed when an ultimate consumer, a customer to whom you have sold Young Iron Works products returns the same to you, claiming that it is faulty or defective? * * *

Witness. The article is returned to Young, who analyze it, and make such adjustment as they deem in order, and that information received by us we pass back to the customer.

---

*Italics herein ours, unless otherwise noted.

Q. (by Mr. McDougall). Is it true that before the customer is given credit that Young Iron Works has the last say in determining whether the complaint——

A. Yes.

Q. (continuing). ——is justified?

A. Yes."

(Rec., pp. 77, 78.)

"Q. And when you spoke a while ago about materials that were returned to you, and that you sent them on to Seattle to the Young Iron Works, that they had the last say as to whether a credit would be made, if the Young Iron Works did not give a credit for any material that they thought was faulty, who would suffer the loss?

A. Usually the customer, if there is a loss involved."

(Rec., p. 82.)

When the above-mentioned arrangement was first consummated by defendant with Weaver Tractor Company, Stockton was presumed part of the Sacramento trade area, but defendant asked Weaver Tractor Company if the latter had any objection to defendant appointing a dealer there and was advised it could do so. (Rec., p. 56.) There were also dealers located at Grass Valley and Redding. (Rec., p. 57.)

The depositions also disclose that the above-mentioned arrangement, which has been in existence since 1945 (Rec., p. 57), had its inception in correspondence between Weaver Tractor Company and defendant commencing with January 18, 1945, when the former

wrote defendant making inquiry if the latter would be interested in having Weaver Tractor Company handle its products in the Sacramento area. (Rec., p. 58; and Pltf. Ex. 1, Rec., p. 94.) The president of defendant, Paul J. Isaacson, replied to this letter on January 24, 1945, and among other things stated:

> "We wish to advise you that we are very much interested in having you *as our representative* in your territory for our line of blocks, tools and manganese hooks * * *
>
> Also enclosed herewith is one of our discount sheets for *distributors.* Its prices are f.o.b. Seattle.
>
> For your information we wish to advise you that we have had a tentative arrangement with the Capitol Tractor and Equipment Company, but we are canceling them out as of today.
>
> The writer will be anxious to call on you the first time he gets down in your territory."
>
> (Rec., p. 61; Pltf. Ex. 2, Rec., p. 95.)

Weaver Tractor Company replied to the foregoing letter on January 30, 1945, and stated in part:

> "We wish to thank you for your letter of January 24 *appointing us representative of your line in this territory,* and assure you that we will do everything possible to make our relationship very happy and profitable."
>
> (Rec., p. 63; Pltf. Ex. 3, Rec., p. 97.)

On February 8, 1945, defendant, through its president, Paul J. Isaacson, wrote Weaver Tractor Company replying to the latter's letter of January 30, 1945. Defendant's letter in part reads:

"Wish to thank you very kindly for your letter of January 30th in reply to our letter of January 24th, *appointing you as our representative in your territory.* From your reputation we feel satisfied that you people will do a very good job for us, and that our relationship will be very happy and of mutual benefit. * * *

Enclosed herewith are four additional discount sheets, also with the catalogues we will send you approximately 250 folders on our new silver lined manganese choker and butt hooks. *You can have your name stamped on them as distributors.* * * *

We assure you of our one hundred per cent cooperation and please do not hesitate to call upon us at any time.

Would it be of any help, and would you think it necessary, to have our field engineer come down and go over the territory with your men? If so, please advise us and we would be pleased to send Mr. Herb Nelson down."

(Rec., pp. 64, 65, 66; Pltf. Ex. 4, Rec., p. 98.)

In addition to the foregoing letters appointing Weaver Tractor Company distributor of defendant's products, it appears defendant's representatives would from time to time come to Weaver Tractor Company's place of business at Sacramento, California, for the purpose of working on and supplementing the arrangement under which the latter represented defendant as its exclusive distributor in the Sacramento Valley area. (Rec., pp. 69, 70.) The representative usually calling was a Mr. Herb Nelson (Rec., p. 73), who was the field engineer of defendant (see Pltf. Ex. 4, Rec., p. 99), but there were instances when a Mr. Isaacson called. (Rec., pp. 73-76; p. 87.)

It also appears from the depositions that defendant furnished Weaver Tractor Company on numerous occasions with catalogues for distribution to the trade (Rec., pp. 70-73); and it likewise appears that the field engineer of defendant, Mr. Herb Nelson, called at the place of business of Weaver Tractor Company at Sacramento, California, about once every six months. (Rec., p. 79.) In that regard the testimony of Mr. Weaver shows:

"Q. Well, that is the letter of February 8, where they referred to Mr. Herb Nelson as the field engineer. Now, has he called on your firm?

A. Yes.

Q. At Sacramento?

A. Yes.

Q. And do you know how often?

A. Probably about once every six months.

Q. And do you see him personally when he comes?

A. Yes, usually.

Q. Do you know what he does when he comes here to see you or your firm?

A. Checks over the stock, discusses some of the features of his line of merchandise, once in a great while rides with our salesmen.

Q. When he rides with your salesmen where does he go?

A. Larger logging accounts.

Q. And do you know what he does when he goes to visit those accounts with your salesmen?

Mr. Davies. If you know?

Witness. I never have been with him.

Q. (by Mr. McDougall). Did you ever discuss with him what he did when he visited these accounts?

A. Yes.

Q. Will you state what he informed you he did?

Mr. Davies. We object to the question upon the ground it is not shown that any statements made by Mr. Nelson are binding at all upon Young Iron Works.

Mr. McDougall. You can answer the question, Mr. Weaver.

A. They discussed with the various officials of the logging concern, *and advantages in using Young rigging.*"

(Rec., pp. 79-80.)

Mr. Lynn, an official of Weaver Tractor Company, stated with respect to discussions taking place when Mr. Herb Nelson called on this firm:

"A. Usually the sales were discussed, the amount of business that we were doing with their line, and that is about the extent of it."

(Rec., p. 88.)

It also appears from the depositions that the arrangement above mentioned under which Weaver Tractor Company had the exclusive privilege of handling the products of defendant in the Sacramento trade area, has been in existence and followed since 1945 (Rec., pp. 57, 69); and that as a result thereof, defendant has realized on a substantial volume of business in the Sacramento trade area on account of merchandise sold through Weaver Tractor Company, the purchases made by Weaver Tractor Company under its discount arrangement with defendant being $10,715.00 for 1945; $10,647.00 for 1946; and $6,052.00 for

1947, up to the time Weaver's deposition was taken on August 27, 1947. (Rec., p. 76.)

Having made its order quashing service of summons in the instant case on the ground that the foregoing facts do not constitute a sufficient showing that defendant was "doing business" in California, the sole question involved on this appeal is whether the Court erred in that regard and whether the nature of the activities carried on by defendant in California are such as to constitute "doing business in this state" within the purview of subdivision (2) of Section 411 of the California Code of Civil Procedure, which deals exclusively with the matter of service of process on a foreign corporation.

SPECIFICATION OF ERROR.

The order of the District Court quashing service of summons on the basis of the finding that defendant was not "doing business" in California is erroneous in that its decision is based on the outmoded corporate presence theory; in that it failed to take cognizance of the well-recognized distinction between doing business sufficient to make a foreign corporation amenable to service of process and doing business sufficient to subject it to state regulation; and in that it failed to take cognizance of a number of material and uncontradicted facts and misapplied the law to the facts here presented.

ARGUMENT.

SUMMARY.

The "corporate presence theory" is no longer the guide post for determining whether a foreign corporation is amenable to process, particularly, where, as here, the cause of action sued on is connected with the activities which establish contacts with the state of the forum so as to make it reasonable and just that the corporation be required to defend an action commenced there; and in such a situation, the matter of amenability to process is not to be judged by the requirements applicable where it is sought to subject a foreign corporation to the licensing or regulatory statutes of a state. Where, as here, a foreign corporation, for the purpose of enhancing the sales of its products in this state and availing itself of a substantial volume of business here, makes exclusive dealer arrangements calling for favorable discounts with business concerns of this state, designates such concerns as its representative and authorizes them to hold themselves out to the general public as distributors of defendant's products, consults with such dealers as to the propriety of appointing other dealers, supplies them with discount sheets, catalogues for distribution to the trade, and sends its representatives into this state for the purpose of discussing and supplementing the distributorship arrangements as well as for the purpose of soliciting business, checking over the stock of dealers, discussing features of defendant's line of merchandise, and visiting accounts

of such dealers in this state for the purpose of pointing out the advantages of using defendant's rigging —all these activities, coupled with the fact that injury has resulted in this state from the negligent manufacture of a product which is sold in this state in consequence of such activities, make it reasonable and just in accordance with our traditional concept of "fair play and substantial justice" that defendant should be subject to service of process in any suit filed in this state on account of such injury.

I.

THE "CORPORATE PRESENCE THEORY", WHICH WAS ADOPTED AND FOLLOWED BY THE DISTRICT COURT IN MAKING ITS ORDER QUASHING SERVICE OF SUMMONS, IS NOT NOW THE CORRECT RULE FOR DETERMINING WHETHER A FOREIGN CORPORATION IS DOING BUSINESS IN SUCH MANNER AS TO MAKE IT AMENABLE TO SERVICE OF PROCESS.

From the opinion of the District Court, it would appear the order quashing service of summons is based solely on the theory that it is only where a foreign corporation "is doing business within the state in such manner and to such extent as to warrant the inference that it is present there", that it can be said to be amenable to service of process there. The theory thus adopted and upon which the order was made is no longer the hard and fast rule previously prevailing in the decisions on the matter of what constitutes doing business in a state. Although cited to the District Court, it apparently

overlooked the recent holding in *International Shoe Co. v. Washington, et al.,* 326 U. S. 310, 66 S. Ct. 154, 162, 90 L. ed. 95, which casts aside the "corporate presence theory", as generally understood, as a prerequisite to making a foreign corporation amenable to process. In holding that solicitation of orders by salesmen, was alone an activity sufficient to permit service of process, the court said:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it *such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'* * * *
>
> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, * * * it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against

it in the courts of the state, *is to beg the question to be decided.* For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in Hutchinson v. Chase & Gilbert (CCA 2d) 45 F2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum *as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.* * * *

'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * *

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, *cannot be simply mechanical or quantitative.* The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, *is a little more or a little less.* St. Louis S. W. R. Co. v. Alexander, supra, (227 U. S. 228, 57 L. ed. 489, 33 S. Ct. 245, Ann. Cas. 1915B 77); International Harvester Co. v. Kentucky, supra (234 U. S. 587, 58 L. ed. 1482, 34 S. Ct. 944). Whether due process is satisfied must depend rather upon the *quality and nature* of the activity *in rela-*

tion to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contracts, ties, or relations. Cf. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, supra; Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 67 L. ed. 573, 43 S. Ct. 293.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of *or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.*"

The departure from the "corporate presence theory" is also recognized in *Wooster v. Trimont Mfg. Co.* (Mo.), 203 S. W. (2d) 411, where the Court, in reversing an order quashing service of summons in a case involving facts similar to those presented in this case, said at page 413:

"The ruling in the International Harvester Company case and prior rulings of the kind have proceeded under the doctrine of what is termed *presence* in the state, but the recent ruling in International Shoe Co. v. State of Washington, et al, 326 U. S. 310, 66 S. Ct. 154, 162, 90 L. ed. 95, 161 A. L. R. 1057, *has been considered a*

departure from such doctrine and a move to the principle of "'fair play' and substantial 'justice'." See 34 Calif. Law Rev. 331. The article in the California Law Review is by the Honorable J. P. McBaine, professor of law, University of California, and former dean of the law school of Missouri University. Speaking of *the departure from the presence doctrine*, the article says: "Rejection of the 'presence' theory obviously compelled announcement of a suitable alternative and, as was to be expected, another theory was announced as furnishing a better solution of this perplexing problem. The new theory seemingly is that *the demands of due process are met by the activities of the agent or agents in the forum if it is 'reasonable in the context of our federal system of government, to require the corporation to defend the particular suit which is brought therein.'*"

In the light of these latest expressions on the subject of what is sufficient to constitute doing business so as to make a foreign corporation amenable to process, it is obvious that the District Court erred in basing its order quashing service of summons herein on the superseded doctrine of corporate presence.

II.

THE DISTRICT COURT OVERLOOKED THE DISTINCTION BETWEEN THE MEANING OF "DOING BUSINESS" AS RELATED TO THE MATTER OF SERVICE OF PROCESS AND THE MATTER OF STATE REGULATION.

At the time the above action was commenced section 411 (2) of the California Code of Civil Procedure provided that "if the suit is against a foreign corporation * * * *doing business in this state*" summons shall be served in the manner provided by section 406 (a) of the Civil Code. Section 406 (a) of said Civil Code authorizes service on the Secretary of State of California, where the foreign corporation to be served, has filed no designation of agent for service of process and where the corporation has no officers in this state. Service of process on defendant in the above action was made by delivery of such process to the Secretary of State in accordance with the provisions of said section.

Section 405 of the California Civil Code provides that "no foreign corporation shall transact *intrastate business*" in California unless it files a copy of its articles with the Secretary of State and a designation of agent for service of process. Section 408 and succeeding sections of said Civil Code provides that a foreign corporation transacting "intrastate business" in California without complying with the provisions of law relative to filing a copy of its articles and a designation of agent, shall be subject to various penalties and prohibitions. As will presently be seen, there is a vital difference in a case of this kind between what constitutes "doing busi-

ness'' for purposes of process and what constitutes transacting ''intrastate business'' so as to make a foreign corporation amenable to the regulatory statutes of the Civil Code. The District Court, however, by adverting to the case of *McMillan Process Co. v. Brown,* 33 Cal. App. (2d) 279, 91 Pac. (2d) 613, in support of its statement that ''the facts here point no stronger, if as strong, to doing business as those found'' in the *McMillan* case ''to be inadequate'', indicates it must have been confused with relation to the law applicable here on the matter of what constitutes doing business for process purposes, and failed to take cognizance of the fact that a foreign corporation may be doing business in a state so as to make it amenable to service of process, yet not be doing business to such an extent as would entitle a state to impose conditions or restrictions upon the right of a foreign corporation to transact business within a state. It was this latter situation that was dealt with in the *McMillan* case and which is heavly relied on by the District Court in discounting the sufficiency of the facts here presented to show defendant was doing business in this state.

The distinction in a case of this kind between the respective matters of process and state regulation with relation to what constitutes doing business is important, and must be recognized in order to properly decide a question that relates only to the process aspect. This is made crystal clear by the decision of this Court in *Liquid Veneer Corp. v. Smuckler* (9th CCA), 90 Fed. (2d) 196, which has been

adopted as a leading case on the subject throughout the country, and wherein, it is said, at page 202:

> "A foreign corporation may be doing business in a state to bring it within the jurisdiction of the court and amenable to its process and yet not obtain a status to be regulated by a state statute or bring it within the statutory provision requiring a license for operation of such foreign corporation."

Another case squarely in point is *The Thew Shovel Co. v. Superior Court,* 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, where, in dealing with the distinction between the various code sections of California bearing on the matter of service of process on a foreign corporation and on the right of that state to impose regulations on the right to do business there, the Court said, commencing at page 185:

> "It (the term 'doing business' as used in section 411 of the Code of Civil Procedure) is not, however, to be confused with the same term when used in statutes (section 405 of the Civil Code) having a different purpose or in proceedings involving difference issues. * * * 'If the question relates to the right to serve process upon the corporation, * * * a different proposition is presented than is presented where it relates to the right and power of the State to impose conditions or restrictions upon the right of a foreign corporation to do business here.' "

On page 188, the Court also said:

> "It appears that petitioner's desire not to be involved in intrastate business arose from its

> unwillingness to take out a license and to comply with attending tax regulations. Whether it succeeded in legally attaining its object is not necessary to pass upon in this proceeding. Suffice to say that whether the business conducted was interstate or intrastate makes no difference if petitioner was 'doing business' in the State of California within the meaning of that term as used in section 411, Code of Civil Procedure."

Another case, where the distinction above referred to is directly involved and made manifest is *State v. Ford Motor Co.* (S. C.), 38 S. E. (2d) 242. There, the precise question was presented whether, in a suit to enforce statutory penalties for failure of a foreign corporation to comply with regulatory statutes, the activities of such corporation made it amenable to process and also to the liabilities imposed by statute for non-compliance. In holding that the activities of the foreign corporation involved were such as to make it amenable to process under the broadened rule laid down in *International Shoe Co. v. State of Washington,* supra, but were not sufficient to subject the corporation to liability for the penalties sought to be collected, the Court said at page 248:

> "The distinction is now well defined, and applicable here, between doing business by a foreign corporation within a state sufficient to subject it to the jurisdiction of the latter's courts, and the doing of intrastate business therein which subjects it to the requirement of domestication and the consequent burdens of state regulation and taxation."

There can be no doubt, therefore, that the District Court was clearly in error in judging the facts of the instant case in the light of decisions involving solely the question of whether the activities of a foreign corporation were sufficient to subject it to matters of statutory regulation only.

III.

THE FACTS OF THE INSTANT CASE ARE SUCH AS TO MAKE IT REASONABLE AND JUST THAT DEFENDANT BE HELD AMENABLE TO PROCESS AND REQUIRED TO DEFEND THE PRESENT ACTION.

While it is true that prior to the decision of the Supreme Court in *International Shoe Company v. Washington,* supra, there were decisions holding mere solicitation alone was not sufficient to render a foreign corporation amenable to process, there were also cases holding that very little more than "mere solicitation" was required to bring about that result (*Frene v. Louisville Cement Co.,* 134 Fed. (2d) 511). Here, defendant's own affidavit in support of the motion to quash, admits one of its salesmen "visits prospective customers in various western states approximately twice a year to solicit orders", and from the uncontradicted facts contained in the depositions herein, it must be inferred that included in the western states thus visited for purposes of solicitation is California. In addition to such solicitation, however, it appears without contradition that other activities were carried on by defendant in this state. The

record shows defendants made arrangements with local concerns, which were undoubtedly contractual in nature, and under the terms of which they should have the exclusive privilege of being dealers of defendant's products in particular areas; that these dealers were allowed to purchase merchandise on a discount basis and were specifically designated by defendant *"as our representative"* in the territory assigned; that defendant consulted its dealer in the Sacramento area relative to obtaining consent to the appointment of another dealer in Stockton; that the dealer appointed for the Sacramento area, Weaver Tractor Company, was specifically authorized to stamp its name on catalogues furnished by defendant showing it was acting as a *distributor* of defendant's products; that at least part of the arrangements for the representation of defendant *was made in California* by representatives of defendant coming here for the purpose of supplementing other portions of the arrangement made by mail; that defendant referred all orders for its products coming from the area assigned, to the dealer located therein, with the explanation that such dealer was defendant's distributor for its products in that area; that all products proving defective would be returned for adjustment to defendant, which had the final say as to whether a credit would be given; that dealers were furnished with discount sheets and with catalogues for distribution to the trade; that defendant arranged for its field engineer to call on its dealer in the Sacramento area, at least once each six months, and who,

upon his arrival, would check the stock of the dealer, discuss features of defendant's line of merchandise and also ride with the dealer's salesmen to the larger logging accounts of the dealer for the purpose of discussing the advantage of using defendant's products; and that in consequence of the foregoing activities defendant was able to realize in the Sacramento area alone a volume of business running into approximately $10,000.00 per year. Under these circumstances, it would seem unquestionable that there is here more than "mere solicitation" and more than merely casual or occasional activities in the fostering of defendant's business in this state, and that even if it were not for the rule enunciated in the *International Shoe Co.* case, defendant should, nevertheless, be considered as doing business in this state so as to make it amenable to process here.

Prior to the *International Shoe Co.* case, there were many decisions holding that the selection of dealers or the creation of distributorships was sufficient to constitute doing business for purposes of process. *(The Thew Shovel Co. v. Superior Court,* 35 Cal. App. (2d) 183, 95 Pac. (2d) 149; *Moore Machinery Co. v. Steward-Warner Corp.,* 27 Fed. Supp. 526; *Knapp v. Bullock Tractor Co.,* 242 Fed. 543; *Bendix Home Appliances v. Radio Accessories Co.,* 129 Fed. (2d) 177, 181; *LaPorte Heinekamp Motor Co. v. Ford Motor Co.,* 24 Fed. (2d) 861; *Carroll Electric Co. v. Freed-Eiseman Radio Corp.,* 50 Fed. (2d) 993; *Vilter Mfg. Co. v. Rolaff,* 110 Fed. (2d) 491).

In the case of the *Thew Shovel Co. v. Superior Court,* 35 Cal. App. (2d) 183, 95 Pac. (2d) 149, the only test for determining whether a foreign corporation is "doing business" in California under section 411 of the Code of Civil Procedure is prescribed at page 185 as follows:

> "The term 'doing business' as used in section 411 of the Code of Civil Procedure, means the entry of a corporation into a state other than that wherein it is incorporated for the purpose of transacting *some substantial part of its ordinary business or exercising some of the functions for which it was created.*"

Certainly, the defendant in the instant case made its exclusive distributor agreements with California firms, solicited business here, and sent its agents here solely "for the purpose of transacting some substantial part of its ordinary business or of exercising some of the functions for which it was created"; and, surely, under the circumstances here presented, defendant enjoys the same advantages in selling its products in California, as it would have in the event branch offices were actually maintained by defendant in this state, and it would indeed be an analomy, if defendant was considered as not doing business in this state merely because it had seized on the device of arranging the sale and distribution of its products in this state through the medium of a number of locally owned firms, each of whom handles defendant's products only because they are given the exclusive right to do so in a designated area and because of a

special discount arrangement made with them by defendant. There is as much reason for holding defendant amenable to process in the present action as existed in the cases cited above, for in each instance, the ultimate object of the manufacturer is the same, namely, the procuring of business in another state by means of a local arrangement and stimulating such business by the rendition of assistance over a period of years by the manufacturer's agents in this state to the local distributors obtaining such business.

Furthermore, there would seem little doubt but that, even under the old rule, the activities of defendant's representatives in this state were certainly such as to constitute a continuous effort to stimulate the sale of its products here. This is indicated not only by defendant's exclusive arrangements with dealers, heretofore referred to, but by its correspondence and by its action in sending its representatives into this state for the purpose of soliciting orders, checking over its dealers' stock, discussing features of its line of merchandise, and making visits upon logging accounts for the purpose of pointing out the advantages of using defendant's products. These latter activities would alone seem sufficient to constitute doing business in this state. A case in point is *Milbank v. Standard Motor Co.*, 132 Cal. App. 67, 22 Pac. (2d) 271, which involves the validity of service of process on a foreign corporation under section 411 of the California Code of Civil Procedure, as it formerly read. There, the point at issue was whether

the foreign corporation was doing business in California by virtue of sending one of its employees into this state to service machinery sold by the manufacturer in interstate commerce. In holding that such service arrangement was alone sufficient to bring the defendant manufacturer within the category of a foreign corporation doing business in California, the court said at page 70:

> "Directing our attention to the activities of defendant in this state, we are of the opinion that they were sufficient in character to constitute 'doing business' for the purpose of the service of summons. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency *was a substantial and important branch of its ordinary business.* It is apparent that the maintenance of such a service does not logically fall within the category of a merely casual or incidental activity of defendant. (Cone v. New Britain Machine Co., 20 Fed. (2d) 593, 595; Beach v. Kerr Turbine Co., 243 Fed. 706.)."

Obviously, a foreign corporation which sends its representatives into this state to consummate exclusive dealer arrangements, and which, over a period of years, and at least once every six months, sends its field engineer to California for the purpose of checking the stock of its distributors, discussing features of his employer's merchandise, and riding with the distributor's salesmen in making visitations upon large logging accounts for the purpose of pointing out the advantages of using products manufac-

tured by the foreign corporation, is engaging in an activity which is as much "a substantial and important branch" of the "ordinary business" of such corporation, as was the servicing activity constituting the basis for the holding in the case just cited.

Regardless of any question which might previously have existed with reference to the foregoing, any doubt in that regard is now laid at rest by the ruling in *International Shoe Co. v. Washington,* supra, and decisions announced subsequent thereto have also definitely recognized the deviation from what might have theretofore been the law on the subject of what constitutes doing business in a state. A case squarely in point, and involving the activities of a foreign corporation in stimulating sales made by dealers to whom defendant's products were sold under a discount arrangement, for resale to the ultimate consumer in specified areas, is *Wooster v. Trimont Mfg. Co.,* 203 S. W. (2d) 411. There, an order quashing service of summons was reversed and the ruling in that regard was based squarely on the principles announced in the case of *International Shoe Co. v. State of Washington,* supra. After recognizing that orders placed by a dealer in Missouri for defendant's products were interstate business in character, but that this alone did not render the defendant immune from process in Missouri, the court said, at page 414:

> "In view of the ruling in the International Shoe Co. case, we are constrained to the rule that, under the facts here, defendant was doing business in this state to the extent of making it amenable to the process served upon it."

Another case announced since the *International Shoe Co.* case, showing the deviation from the former rule is *Lasky v. Norfolk & W. Ry. Co.*, C.C.A. 6th, 157 Fed. (2d) 674; and still another case to the same effect, and containing an exhaustive discussion and reference to the numerous cases involving dealerships, and involving activities conducted in assisting such dealers in disposing of the products of defendant through the medium of resale, is *State v. Ford Motor Co.* (S. C.), 38 S. E. (2d) 242. This last decision refers to the ruling in the *International Shoe Co.* case, and after analyzing many decisions involving a manufacturer-dealer relationship, held that although the activities of the manufacturer's agents might not constitute the doing of business so as to make the manufacturer amenable to statutory penalties for failure to become domesticated, such manufacturer was, nevertheless, engaged in activities that made it amenable to service of process. In that regard, the court, at page 254, said:

> "Appellant's business in South Carolina is interstate in character, according to the evidence, and it cannot be required to domesticate or suffer the statutory penalty for failure thereabout. Infliction of the latter would burden interstate commerce, which the state cannot constitutionally do. Appellant's many dealers in the state are not its agents; they are in intrastate business here, not it. And its traveling representatives are here on occasions 'servicing' its warranties, cultivating the interstate business, supervising it and soliciting more, but they make no local sales or collections nor engage otherwise in intra-

> state business so far as the record before us shows. *The activities of the itinerant representatives are incidental to the interstate business but they undoubtedly manifest the presence here of the corporation for jurisdictional purposes.*

As noted in the *International Shoe Co.* case, the question here to be decided, namely, whether the activities of defendant make it amenable to process, is not to be determined on the basis of "mechanical or quantitative" criteria. Neither is the effect of such activities to be considered merely in the light of whether they are "a little more or a little less". It would seem, however, that the District Court followed the contrary of these conceptions, rather than giving consideration to the *"quality and nature* of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." Under the ruling in the *International Shoe Co.* case, if the activities carried on by defendant in this state enabled it to enjoy the benefit and protection of the laws of this state, and if the obligation here sued on is connected with those activities, there is no question but that under the new rule, defendant should be required to respond to service of process in this action. Here, there is no question but that the activities of defendant hereinabove enumerated were such as would have entitled defendant to have recourse in the Courts of California to enforce any of its rights arising therefrom, and that defendant has definitely received the benefit and protection of the laws of this state, while carry-

ing on those activities; and it is likewise unquestionable that the liability here sued on is connected with those activities, for plaintiff's injury arose from one of the sales which those activities were definitely calculated to promote. Under these circumstances the following language used in *International Shoe Co.* case is pertinent. Speaking of the activities of the foreign corporation there involved and the use of salesmen to take orders, the court said:

> "They resulted in a large volume of interstate business, in the course of which appellant received *the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities.* It is evident that *these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.* Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure."

It is respectfully submitted that the order of the District Court quashing service of summons in the instant case should be reversed.

Dated, Sacramento, California,
June 24, 1948.

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